

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF :)		
)		
JOHN MURRAY,)		
Complainant)		
)	CHARGE NO.:	1999CF2639
and)	EEOC NO.:	21B 992058
)	ALS NO.:	11560
BRANDY'S AUTOMOTIVE, INC.,)		
Respondent)		

RECOMMENDED ORDER AND DECISION

This matter comes before the Commission on Complainant's Petition for Fees and Expenses, filed on March 13, 2009, which was submitted after entry of a Recommended Liability Determination (RLD) on December 23, 2008. Respondent did not submit a response to the Petition or any request for an extension of time to do so. In the RLD, it is recommended that Complainant be given back pay in the amount of \$52,557 (plus interest); other elements of the award are found in the RLD which is appended to this Recommended Order and Decision. The recommended award also includes the payment by Respondent of "reasonable attorney's fees and costs incurred" by Complainant in this case. This Recommended Order and Decision incorporates the RLD in its entirety as the recommendation on the merits of the case and will add the recommendation for the amount of attorney's fees and costs to be awarded to Complainant.

The Illinois Department of Human Rights is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

Findings of Fact

1. Complainant is entitled to attorney's fees and costs in accord with the RLD entered in this case on December 23, 2008.

2. Complainant was represented by the firm of Anderson + Wanca of Rolling Meadows, Illinois. Lead counsel at the public hearing was Steven A. Smith, and Brian Wanca, Ryan Kelly and Michael Schau of the firm also performed professional services on behalf of Complainant during the pendency of this case.
3. The hourly rate requested for Mr. Wanca and Mr. Smith is \$225.00, while it is requested that Mr. Kelly and Mr. Schau receive \$155.00 per hour. These rates are fair and reasonable and are well within the current Commission standard for attorney's fees.
4. The members of the firm reasonably expended 318.75 hours representing Complainant before the Commission in this matter. Further, the firm reasonably expended the amount of \$2,351.66 on costs associated with this matter.
5. Based on the hourly rates requested for each attorney, the firm of Anderson + Wanca is entitled to fees in the amount of \$64,550.75.

Conclusions of Law

1. The petition for attorney's fees and costs is granted.
2. No hearing is necessary to determine a reasonable attorney's fee award in this case.
3. Respondent chose not to respond to the Petition. Accordingly, all issues related to the request for fees and costs are considered waived. Baker and Village of Niles, IHRC ALS No. 10940, April 29, 2002.
4. The record does not support the use of a multiplier to enhance the approved attorney's fee in this matter. Podgurski and Rackow, 11 Ill. HRC Rep. 55 (1984).
5. The RLD previously issued in this case is adopted in its entirety, including all elements of the recommended award.

Discussion

In considering petitions for the award of attorney's fees and costs, the Commission requires that any award be fair and reasonable. The most common measure of fees remains the charging of a set rate per hour for work performed in consideration of the client's matter at hand, and multiplying that figure by the number of hours expended. This is particularly useful when a fee award such as that for this case is being considered because it gives the Commission an opportunity to be informed of the actual work devoted by the attorney to the case. The standard for determining the proper fee award by the Commission is found in Clark and Champaign National Bank, 4 Ill. HRC Rep. 193 (1982).

As noted, Respondent chose not to respond to Complainant's Petition. The Baker case, cited above, is only one of a long line of cases holding that if the respondent does not contest the particulars of a petition for fees and costs, all issues related to the petition are waived. Here, the members of the firm are claiming hourly rates of \$225.00 and \$155.00 per hour. These rates are well within the range of hourly rates currently being approved by the Commission. The waiver of Respondent alone supports the acceptance of these requested rates, but I also find that these hourly rates are reasonable in any circumstance and are supported by the description of the professional backgrounds provided by affidavit of the four attorneys who worked on this case.

The hours of work claimed by the attorneys is also reviewed in light of the failure of Respondent to file a response to the Petition. While the Commission will reject requested hours that do not comport with its established policies in this area, even in the face of a respondent's waiver, a review of the itemized statement of hours worked by the attorneys in this matter reveals that none are objectionable on their face. Therefore, it is recommended that the Petition be granted for the full schedule of hours reflected in Exhibit A of the Petition. This analysis likewise applies to the request for costs included in the Petition. Complainant's request for his attorney's fees and costs should be granted in full. The recommended award will be for 318.75

hours payable at the hourly rates specified in the Petition to the members of the firm of Anderson + Wanca for a total of \$64,550.75 in fees and \$2,351.66 for the costs incurred by the firm.

Complainant's Petition included a request that the fee awarded by the Commission be subject to a multiplier of 2.0 due to the contingent nature of the fee agreement with Complainant, the complexity of the litigation and the successful outcome of the case in favor of Complainant. While Complainant cites several examples of the award of such multipliers in the courts of Illinois and in the federal courts, there is no citation to any case of the Commission in which such a multiplier was granted. While the Commission has discussed the issue of a multiplier in several cases over time, I am unable to find a single case where a multiplier has been applied to an attorney's fee award. This may stem from the high standard the Commission has defined for even considering a multiplier. Not only must the attorney's work be "exceptional" to meet the threshold for consideration, but "[a] multiplier is not justified in every case where the attorney's presentation is exceptionally good." Podgurski and Rackow, 11 Ill. HRC Rep. 55, 58 (1984).

Here, Complainant first asks that the fee award be increased due to the contingent nature of the case. Generally, when an attorney seeks a fee award through the Commission, he or she is agreeing to forego the benefit of any contingency fee agreement with the client. The award of a "fair and reasonable" attorney fee in accord with the Human Rights Act is sufficient compensation to the attorney for the effort expended to achieve the result for the client. A further enhancement due to the contingent nature of the case would constitute a windfall to the attorney. In lieu of any contingency fee, the Commission will provide a full, fair and reasonable attorney's fee. See York and Al-Par Liquors, IHRC ALS No. 3415, June 29, 1995.

Complainant also asserts that a multiplier should be applied because "Counsel's work was substantial and successful." The success in proving the liability of Respondent is, of course, the reason that any fee is payable to Complainant by Respondent. The quality of the

work performed by Complainant's legal team is what has led to the conclusion that the requested hourly rates and the tasks stated in the Petition should be accepted with no modification. These meet the minimum requirements under Clark and do not meet the Commission standard that the legal work must be "exceptional" if a multiplier is to be applied.

Recommendation

It is recommended that in accord with the finding of liability included in the Recommended Liability Determination of December 23, 2008 that Complainant receive all of the relief recommended in the RLD and that Respondent pay to Complainant the sum of \$64,550.75 as attorney's fees and \$2,351.66 as costs sustained in the prosecution of this matter before the Commission, a total of \$66,902.41.

HUMAN RIGHTS COMMISSION

ENTERED:

November 9, 2009

BY:

DAVID J. BRENT
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

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JOHN MURRAY,)		
Complainant)		
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)	ALS NO.:	11560
BRANDY'S AUTOMOTIVE, INC.,)		
Respondents)		

RECOMMENDED LIABILITY DETERMINATION

This matter comes before the Commission following a public hearing that was conducted on April 21, 22 and 23, 2004 and July 26, 27, and 28, 2004 at which both parties appeared and participated. Both parties filed post-hearing briefs and each in turn filed a reply brief. This matter is now ready for decision.

The Illinois Department of Human Rights is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

Statement of the Case

Complainant filed his Charge No. 1999CF2639 against Respondent, Brandy's Automotive, Inc., on May 20, 1999. The charge alleges that Complainant was not allowed to return to work and was discharged due to his handicap, major depression.

On June 18, 2001, the Department of Human Rights filed a complaint with the Commission on behalf of Complainant in which it alleged that Respondent failed to return Complainant to work and discharged Complainant from his employment because of his handicap, both in violation of Section 102(A) of the Illinois Human Rights Act. As permitted by the Commission's rules, Respondent filed a Motion to Dismiss on August 7, 2001 in lieu of a verified answer. However, the Motion to Dismiss was withdrawn on August 16, 2001. Some discovery then took place even though a verified answer was not immediately filed by

Respondent. Then, on February 27, 2002, Respondent filed a Motion for Summary Decision which was denied on January 31, 2003. In the latter order, Respondent was ordered to file its verified answer by March 7, 2003 and Respondent did so on that date. Upon completion of additional discovery, Respondent filed a Motion for Leave to File Its Renewed Motion for Summary Decision on November 25, 2003. This motion was denied in that the parties were in the process of preparing the joint pre-hearing memorandum in anticipation of the final status hearing on December 11, 2003. The joint pre-hearing memorandum was filed on December 9, 2003 and the public hearing was scheduled to begin on April 21, 2004. As noted above, the public hearing did commence on that day and was continued until it was completed on July 28, 2004. This matter is now ready for decision.

Findings of Fact

1. Complainant, John Murray, filed his Charge No. 1999CF2639 with the Illinois Department of Human Rights on May 20, 1999, alleging that Respondent, Brandy's Automotive, Inc., discriminated against him due to his handicap, major depression.
2. Complainant was employed for the second time by Respondent in November, 1998 and remained employed there until his termination on or after May 17, 1999. At the time of his termination, Complainant was a service advisor/service manager/assistant manager in training.
3. Respondent is an automobile repair shop open to the public.
4. After completing his shift on Friday, April 23, 1999, Complainant went out drinking with the manager of Respondent's facility. After leaving the manager, Complainant obtained certain non-prescription medications and additional alcoholic beverages that he had used in combination to attempt suicide at other times in his life.

5. In the early hours of Sunday, April 25, 1999, Complainant sought shelter from his ex-wife, Marcella Murray, and remained there until he went to Northwest Community Hospital on Tuesday, April 27, 1999. He was admitted to the hospital as an inpatient in the psychiatric ward.
6. Dr. Jacob Moskovic, Complainant's treating physician, diagnosed Complainant's condition as major depression.
7. Complainant was scheduled to work at Respondent on each day from Sunday, April 25, 1999 through Tuesday, April 27, 1999. He did not personally call in or otherwise notify Respondent that he would not be at work on any of those days. However, Marcella Murray did speak to representatives of Respondent by no later than Monday morning, April 26, 1999 concerning Complainant's condition and later notified them of his hospitalization.
8. Respondent did not terminate Complainant's employment during the week of April 25, 1999 and did not do so until on or after May 17, 1999.
9. Complainant was discharged from the hospital on Friday, April 30, 1999 at about noon and immediately went to Respondent's shop where he presented a letter from Dr. Moskovic that indicated he was fit to return to work without restriction. He was not allowed to return to work, however, pending review of his documentation by the owners of Respondent.
10. Respondent's management substituted its own diagnosis of "alcoholism" for the diagnosis of "major depression" presented by Dr. Moskovic. Respondent requested that Complainant be evaluated for admission to a substance abuse program even though he also presented evidence that he would be engaged in ongoing treatment both by Dr. Moskovic and in a group therapy setting.
11. When Complainant revealed to Respondent on May 19, 1999 that he was consulting with an attorney about his treatment by Respondent, he was informed

that he was terminated from his employment. A letter dated May 17, 1999 was apparently sent by Respondent notifying Complainant of his discharge, but Complainant never received a copy of that letter.

Conclusions of Law

1. Complainant is an "aggrieved party," and Respondent is an "employer" as those terms are defined by the Illinois Human Rights Act, 775 ILCS 5/103(B), 5/2-101(B)(b) and 2-102(D).
2. The Commission has jurisdiction over the parties and the subject matter of this action.
3. Respondent was Complainant's employer from November, 1998 through May, 1999, the period relevant to this complaint.
4. Complainant established by a preponderance of the evidence that he was discriminated against by Respondent due to his handicap, major depression.
5. Complainant is entitled to an award including back pay, medical expenses and attorney's fees and costs in order to be made whole. The details of each award are listed in the body of this recommended order and decision, and are incorporated in this finding.
6. Complainant is not entitled to an award based on emotional distress or the loss of personal property.

Discussion

A. *Prima Facie Case for Disability (now Handicap) Discrimination*

Complainant alleges in Count I of the complaint that he was not permitted to return to work after a hospitalization during which he was diagnosed with the condition "major depression." Likewise, he alleges that he was ultimately discharged due to his condition of "major depression." The *prima facie* case for handicap discrimination is found in Whipple v. Dept. of Rehabilitation Services, et al., 269 Ill.App.3d 554, 646 N.E.2d 275, 206 Ill.Dec. 908 (4th

Dist. 1995). The three elements of the *prima facie* case are: 1) (complainant) is handicapped within the definition of the (Human Rights) Act; 2) (complainant's) handicap is unrelated to his or her ability to perform the functions of the job he or she was hired to perform; and, 3) an adverse job action was taken against complainant related to his or her handicap. *Id.* at 577. Under the familiar method described long ago in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and adopted for use by the Commission by the Illinois Supreme Court, it is incumbent upon the complainant to prove each element of the *prima facie* case by a preponderance of the evidence. If he is successful in doing so, the respondent must articulate (but not prove) a legitimate business reason for the action taken. If the respondent does so, it then falls to the complainant to prove that the proffered reason is pretextual and that the real reason for the adverse act is discriminatory.

In this case, the only dispute is whether Respondent took the adverse action of termination of employment against Complainant due to his handicap. There is no dispute that Complainant suffered from a qualifying condition under the Act or that Complainant was subjected to an adverse action by Respondent in that he was not permitted to return to work after his hospitalization and that he was eventually terminated from that employment.

In accord with the first prong, Complainant is handicapped as provided in the Human Rights Act. A "handicap" is defined in the Act as "a determinable physical or mental characteristic of a person ... which may result from disease, injury, congenital condition or birth or functional disorder" 775 ILCS 5/1-103(l). In the complaint, Complainant's condition is identified as "major depression." Complaint, Paragraph Three. During the course of the public hearing, Complainant presented the testimony of his treating physician at or near the time of the discriminatory events stated in the complaint, Dr. Jacob Moskovic. Dr. Moskovic stated in his testimony that the final diagnosis of Complainant during his hospitalization in late April, 1999 was "major depression." Tr. 34. In its initial post-hearing brief, Respondent acknowledges that "Major Depression is a determinable mental characteristic of a person that results from

disease.” Respondent, Initial Post-Hearing Brief at 22. This is the only reference in the Brief where Respondent discusses the actual diagnosis identified by Complainant in his complaint. Thus, there is no dispute between the parties that Complainant, in fact, suffered from “major depression” at the time of the incidents alleged in the complaint and there is no argument in the record concerning “major depression” as a handicap under the Act.

Respondent also never discusses whether or not Complainant’s handicap prevented him from performing the duties of his position with Respondent. The record shows that Complainant was admitted as an in-patient at a hospital late on Tuesday, April 27, 1999 or the early hours of Wednesday, April 28, 1999. As noted above, Dr. Moskovic, his treating physician, arrived at a diagnosis of “major depression.” While this illness can vary in its severity, Dr. Moskovic provided Complainant with a note indicating that he was fit to return to work without restriction when he was discharged from the hospital on Friday, April 30, 1999. Major depression is an illness that is recognized by the Commission as fulfilling the definition of “handicap” in the Act. Zimmerman and Illinois Central Gulf Railroad, IHRC, ALS No. 3446 (November 23, 1992). Particularly in light of Dr. Moskovic’s certification that Complainant was able to return to work without restriction, which was not contradicted by any evidence presented at the public hearing by Respondent, Complainant was able to fulfill the requirements of his employment when he presented himself to Respondent on the afternoon of April 30, 1999.

For the purpose of establishing the *prima facie* case, the timing of Complainant’s termination by Respondent is sufficient to establish the final element of the *prima facie* case. Even though Complainant provided Respondent with more than one certification from Dr. Moskovic regarding his fitness to return to work, Respondent continually declined to permit him to return to work on and after April 30th, but without advising him that he was terminated until it finally terminated him on or about May 17, 1999. Therefore, Complainant has established all of the elements of the *prima facie* case.

B. Respondent's Articulation of a Legitimate Business Reason for Termination

Respondent asserts that it terminated Complainant's employment as early as April 27, 1999 because he was absent without notice on Sunday, April 25, 1999 through Tuesday, April 27, 1999. In support of this argument, Respondent points out the virtually axiomatic principle that a person is unable to perform the duties of his or her employment if that person is absent from the workplace. It is often found that termination due to absence (or unexcused or unexplained absence) is a legitimate reason for terminating an employee. And there is no dispute in this matter that Complainant never returned to the workplace to work after he left there on Friday, April 23, 1999. However, when all of the evidence in the record is considered, there is no support for Respondent's position that it acted lawfully when it terminated Complainant.

Complainant began his employment with Respondent, an automobile repair business, in April, 1997, first as a mechanic's helper. From April, 1997 to May, 1998, Complainant was warned twice in writing about unexcused absences. In May, 1998, he left Respondent to work for another auto repair business. Then, in November, 1998, Respondent rehired Complainant, this time as a service advisor/service manager/assistant manager in training. He was given important responsibilities relating to the functioning of Respondent's facility, involving staff supervision, customer service and authority to open the facility in the morning and close at night. In February, 1999, Complainant was given a verbal warning from management for missing two days of work without calling in while he was being treated in a hospital for an inflammation of the pancreas. In 1999, Respondent maintains that it had a progressive disciplinary policy that began with a verbal warning, followed by a written warning, followed by discharge although no employee manual or other written evidence of the purported disciplinary policy was presented at the public hearing. A verbal warning was allegedly given to Complainant for his absence in February, 1999. Tr. 660

On Friday, April 23, 1999, Complainant was invited by his supervisor, George Lichounas, to go out drinking that evening after work. Complainant drank heavily while out with Lichounas and his mental condition further deteriorated over the course of the weekend. He continued to drink and he also obtained certain non-prescription medications which were the same as those he had previously used to attempt suicide in (or about) 1985, 1988 and 1996. Early Sunday morning, April 25th, he arrived at the home of his ex-wife, Marcella Murray. Although Complainant was scheduled to work on Sunday, April 25, 1999, he remained at Marcella's home sleeping on the couch. No one spoke to anyone at the shop on Sunday, although Manager Lichounas left a message on Marcella's answering machine inquiring about Complainant's whereabouts.

On Monday, April 26, 1999, Complainant was again scheduled to work, but instead remained on the couch, apparently all day. When Marcella returned home, she became concerned enough to suggest that Complainant needed to go to the hospital. Complainant declined, but then went to see his current landlord, Peggy Hermson, in the evening. He returned to Marcella's and again went to sleep. On Tuesday, April 27, 1999, Complainant again did not go to work, but remained at Marcella's home the entire day. Marcella then determined that Complainant had to go to the hospital and at about 9:00 p.m. took him to the emergency room at Northwest Community Hospital in Arlington Heights where he was examined and later admitted as an inpatient in the psychiatric ward.

The parties agree that Respondent was first notified about Complainant's condition by Marcella, but there is a dispute between the parties about when this notification was given. Complainant asserts that Marcella, at his request, spoke to personnel at Respondent as early as Monday, April 26, 1999 (Mike Goehring in the morning and Lichounas in the afternoon) concerning Complainant's illness. Complainant also maintains that Marcella called Lichounas on both Tuesday and Wednesday about his continued need for a medical leave. However,

Respondent claims that Marcella did not speak to Lichounas until Wednesday, April 28th, and that by then, the termination of Complainant allegedly had been completed.

It should be noted here that George Lichounas did not testify as a witness in this matter because he was residing in Greece at the time of the public hearing. Respondent wished to place an affidavit from Lichounas in the record in lieu of his testimony, but Complainant's motion *in limine* asking that this not be permitted was granted with the concurrence of Respondent. Tr. 14.

However, Mike Goehring, a service advisor for Respondent in April, 1999 (and later assistant manager), did recall speaking to a woman about Complainant's absence from work, although he could not remember who it was or on what date the call took place. Marcella Murray testified that she spoke to Goehring on Monday morning. He told her that Lichounas was not there because there was a manager's meeting at another company facility that morning. Tr. 116. I will note here that Marcella Murray's testimony on this point as well as other points relevant to the issues in this case was quite credible. Her testimony overall was given confidently and without hesitation, while the accounts provided by Respondent's personnel were often hesitant or lacking in detail. In particular, her account of the Monday morning telephone call corroborates Goehring's incomplete recollection.

Respondent asserts that it terminated Complainant's employment on Tuesday, April 27, 1999 based on the failure of Complainant to contact it regarding his absences from work on Sunday, Monday and Tuesday, April 25 through April 27. The termination allegedly was memorialized by a cryptic note that co-owner Joseph Palmisano wrote on Complainant's regular pay check that was issued on April 28th: "John, Sorry you couldn't keep your job in perspective. I wish you luck. Joe." R.Ex 1. No letter was sent to Complainant, nor was the "termination" ever communicated directly or indirectly to Complainant by any means. In further support of their contention Complainant was terminated, Respondent also indicated that it placed a newspaper advertisement for Complainant's position that week. The advertisement was not

presented in evidence, but, in fact, Complainant himself saw the advertisement on Thursday, April 29, 1999 and spoke to Marcella about it.

In other circumstances, the paycheck note and the advertisement could be circumstantial evidence that a termination was intended. However, there is more in the timeline leading to the issuance of a termination letter on or about May 17, 1999 that indicates that termination was not the intended result by Respondent when the note and advertisement were issued. Complainant was discharged from the hospital on Friday, April 30, 1999 and Dr. Moskovic provided him with a note that stated he was fit to return to work without restriction, along with a discharge summary of his condition. He was also given a prescription for the antidepressant medication, Nortriptyline. Complainant went from the hospital directly to Respondent's facility and met with Lichounas. Lichounas received the documents tendered by Complainant and read them but did not allow Complainant to return to active status at that time. He also did not inform Complainant that he was terminated then or on any other occasion earlier that week. Instead, he indicated that more information would be needed and that the documents would be reviewed by the owners who would then make the decision regarding his return to work.

At the request of Complainant, Dr. Moskovic prepared a letter dated May 4, 1999 in which he expanded on the information contained in the other documents. He also provided details about Complainant's after-care and noted that his next appointment with the doctor was on May 13, 1999. The doctor reiterated that the prognosis for recovery was "good" and that Complainant could return to work without restriction. C.Ex. 1. This letter was given to Lichounas by Complainant on May 4th. Lichounas again indicated the letter was insufficient and did not allow Complainant to return to work. Again, however, Lichounas did not give Complainant any notice, written or oral, that he was terminated from his employment with Respondent.

On May 10, 1999, Complainant spoke to co-owner Palmisano. In response to Complainant's inquiry, Palmisano confirmed that Complainant was not, in fact, terminated, but that the documentation he had provided to date was not sufficient. He further indicated that Complainant must be in a substance abuse treatment program before he would be allowed back to work.

Complainant next authorized the release of his complete medical record to Respondent. This was done on May 13, 1999. On May 14th, Dr. Moskovic prepared another letter, which was sent by FAX to Respondent, in which he stated that Complainant would be attending "transition" meetings at the hospital every Tuesday evening to supplement his visits with Dr. Moskovic. C.Ex. J. After this letter was sent, Complainant was again advised by Respondent that he needed substance abuse treatment.

Complainant's next contact with Respondent was on May 19, 1999 when he spoke to Lichounas over the telephone. During the call, Complainant revealed that he had contacted an attorney concerning his return to work. The response from Lichounas was that he should consider himself terminated. The reasons given were "job abandonment" and for taking too long to obtain the necessary medical information. Although Complainant never received it at the time (most likely due to his relocation to West Virginia), Respondent apparently prepared a letter dated May 17, 1999 memorializing the termination for being absent "for days at a time with no phone call" which was later tendered to Complainant during discovery in this case. R.Ex. 4.

While Respondent may have considered taking disciplinary action against Complainant during the week he was in the hospital, it did not perfect any such action at that time. Instead, even after receiving sufficient information from Complainant's treating physician regarding his handicap, major depression, Respondent substituted its own flawed evaluation of his condition by insisting that he was in need of treatment for substance abuse before he could return to his employment. It did not terminate his employment until May 19, 1999 when Complainant revealed he had consulted an attorney. It is clear that Respondent terminated Complainant on

or about May 17, 1999 because of his handicap, even though the only professional medical opinion provided in this record indicated that he was able to return to work without restriction. Respondent is guilty of a violation of the Human Rights Act in that it discriminated against Complainant due to his handicap, major depression. With the finding of liability on the part of Respondent, it is necessary to determine the damages suffered by Complainant.

C. Damages

Back Pay -- The first element of damages to be considered is Complainant's request for back pay. The calculation of back pay is always somewhat speculative, but it is the Commission's general principle that any ambiguity in this process be resolved in favor of a prevailing complainant due to the finding of liability against the respondent. Clark v. Human Rights Commission, 141 Ill.App.3d 178, 183, 490 N.E.2d 29, 95 Ill.Dec. 556 (1st Dist. 1986).

In this case, the last date on which Complainant was on payroll status with Respondent was April 23, 1999. At the public hearing, Complainant requested back pay only through the end of calendar year 2002 (apparently recognizing that his then-current income began to exceed his projected income from Respondent). However, because his income for 2002 also exceeded his projected income from Respondent, the back pay award will conclude with the 2001 calendar year.

During 1999, Complainant testified that he was paid between \$680 and \$700 per week. Therefore, using an average of \$690 per week as a starting figure, Complainant made \$2,990 per month during his employment with Respondent in 1999. During 1999, Complainant's total income was \$15,831 including both the salary he earned at Respondent and that which he earned at his new employment beginning in August, 1999. *[This income amount and that for the year 2000 (below) were taken from Complainant's Social Security Statement dated November 14, 2001; C.Ex O, Pages 1-3.]* Complainant's projected income, if he had remained employed by Respondent for the 12 months of 1999 would have been \$35,880. Therefore, Complainant's back pay for 1999 is \$20,048.

In computing his back pay after 1999, Complainant applied a 3% increase annually to his projected income from Respondent as shown above. However, there is no evidence in the record from either party of any general increases that were granted to Respondent's employees during that period. Therefore, Complainant's back pay for 2000 and 2001 will be computed using the rate of pay found in the preceding paragraph. In 2000, Complainant earned \$16,660. Subtracting this amount from \$35,880 results in a back pay amount of \$19,220 for 2000. Complainant's income from two different employers in 2001 was \$22,591, leaving back pay of \$13,289. Finally, in 2002, Complainant's income with his most recent employer (\$36,064) exceeded his projected income of \$35,880 from Respondent. Therefore, there is no back pay award for 2002 (or after).

Complainant's total recommended back pay award for the years 1999, 2000 and 2001 is \$52,557. Although Complainant may have received unemployment compensation following his termination, neither party presented evidence of the amount of such compensation. Therefore, there is no setoff against the recommended back pay award for this benefit. Complainant did not request reinstatement to his employment with Respondent.

Emotional Distress -- Complainant has requested \$100,000 as compensation for the emotional distress he allegedly experienced due to the discriminatory treatment he received from Respondent. However, the record reflects very little detail about the nature of the alleged emotional distress. Any testimony by Complainant touching on his emotional state is vague and does not directly relate the experience at Respondent to the issues in his life that were problematic. For example, he testified about the deterioration of the relationship between him and his son, but then indicated this was an ongoing problem more related to the effects of the divorce between Complainant and Marcella rather than being entwined with the treatment he received from Respondent. Tr. 1307-09. The Commission will not make an award for emotional distress unless that distress exceeds that which would be expected to result from the alleged violation of the Act as proven: "... the mere fact of a civil rights violation without more, ...

, is insufficient to support an award for emotional distress.” Davenport and Hennessey Forrestal Illinois, Inc., ALS No. S-3751R, November 20, 1998, *citing*, Smith and Cook County Sheriff’s Office, 19 Ill. H.R.C. Rep. 131, 145 (1985). Therefore, there will be no award for emotional distress recommended in this case

Medical Expenses -- Complainant also claims that certain medical expenses were not paid through the health insurance he carried while employed by Respondent or that were not covered after his termination due to cancellation of that insurance. The invoices submitted by Complainant in his Exhibit N include: August 2, 1999 - \$955 to Dr. Moskovic; \$250 to Northwest Community Hospital (apparently the deductible applied to his hospitalization in April, 1999); \$4,043 to Alexian Brothers Hospital for his hospitalization in January/February, 1999; and, \$284 to Emer & Ambulatory Care Consult, the emergency room physician in January, 1999. The total requested is \$5,532.

First, there is no evidence that the bills concerning Complainant’s hospitalization in January and February, 1999 are related to this case in any way. It is not possible for the Commission to award the payment of medical bills for which the non-payment is not in some way interwoven with the discriminatory termination experienced by Complainant in this matter. Therefore, the Alexian Brothers and Emer & Ambulatory Care bills will not be the subject of an award in this case.

The bills from Dr. Moskovic and Northwest Community Hospital are related to this matter, however. At the public hearing, Respondent asserted that the bill from Dr. Moskovic was paid in full and that the balance owed to Northwest Community was the deductible under Complainant’s insurance and not yet paid by him. There is no evidence in the record as to the source of any payment made to Dr. Moskovic. It could have been paid by insurance, as was the bulk of Complainant’s hospital bill at Northwest Community, it could have been paid by Complainant, although he did not testify to this or present a cancelled check or other proof of payment, or, Dr. Moskovic could have simply written off this charge. I would also note that

Complainant did not respond in his reply brief in any way to the argument of Respondent regarding the status of his account with Dr. Moskovic. Therefore, I find that Complainant did not establish that he had to pay for this expense out of pocket and is not entitled to an award in this amount. Finally, Complainant is also not entitled to an award for the \$250 owed to Northwest Community Hospital. The record indicates that this is the deductible remaining after Complainant's insurance paid its portion of the hospital bill. This is an expense that would have been borne by Complainant even if there had been no discriminatory conduct by Respondent. The Commission is unable to make an award under this circumstance. There will be no recommended award for medical expenses in this case.

Lost Property -- While Complainant presented testimony (Tr. 1346-49) regarding certain personal property he left behind when he moved to West Virginia after his termination, he did not reduce this to a claim in his post-hearing brief. This was undoubtedly because the circumstances described in his testimony demonstrated that the culpability of Respondent for this claim was remote and unproven. Therefore, there will be no award for any lost or abandoned personal property.

Attorney's Fees and Costs -- In that Complainant has prevailed on the issue of liability, he is entitled to an award in the amount of his reasonable attorney's fees and costs. This award will be made in a Recommended Order and Decision after Complainant submits a petition in accord with the schedule found below.

Training -- The evidence in this case indicates that Respondent and the executives who operate it fall short in their method of dealing with employees who present a handicap condition caused by mental illness. Therefore, it is recommended that the management employees of Respondent be required to undergo training as prescribed by the Illinois Department of Human Rights to prevent a recurrence of the unlawful activity found in this case.

Other elements of the award, as permitted by the cited sections of the Act and the Commission's procedural rules, or otherwise not requiring additional analysis, are specified in the recommendation summary below.

Recommendation

Complainant has established by a preponderance of the evidence that he was subjected to termination of his employment due to the discrimination based on his handicap, major depression, by Respondent as specified in his complaint. Therefore, it is recommended that the complaint be sustained. Further, it is recommended that Respondent be found liable for an award under the Illinois Human Rights Act. Accordingly, it is recommended that Complainant be awarded the following relief:

- A. That Respondents pay Complainant back pay in the amount of \$52,557 for the period May, 1999 through December, 2001;
- B. That Respondents pay Complainant interest on all elements of this award contemplated by Section 8A-104(J) of the Human Rights Act (735 ILCS 5/8A-104(J)) as listed above and calculated as provided in Section 5300.1145 of the Commission's Procedural Rules, to accrue until payment in full is made by Respondents;
- C. That any public contract currently held by Respondents be terminated forthwith and that Respondents be barred from participating in any public contract for three years in accord with Section 8-109(A)(1) and (2) of the Human Rights Act. 775 ILCS 5/8-109(A)(1) and (2);
- D. That Respondent cease and desist from any discriminatory actions with regard to any of its employees and that Respondent, its managers, supervisors and employees be referred to the Department of Human Rights Training Institute (or any similar program specified by the Department) to receive such training as is

necessary to prevent future civil rights violations, with all expenses for such training to be borne by Respondent;

- E. That Complainant's personnel file or any other file kept by Respondents concerning Complainant be purged of any reference to this discrimination charge and this litigation;
- F. That Respondent pay to Complainant the reasonable attorney's fees and costs incurred as a result of the civil rights violation that is recommended to be sustained in this Recommended Liability Determination, that amount to be determined after review of a properly submitted petition with attached affidavits and other supporting documentation meeting the standards set forth in Clark and Champaign National Bank, 4 Ill. H.R.C. Rep. 193 (1982), to be filed by no later than Friday, January 30, 2009 or 21 days after service of this Recommended Liability Determination, whichever is later. If such petition is not timely filed, it will be taken as a waiver of attorney's fees and costs. If a petition is filed, Respondent shall respond by no later than Friday, February 27, 2009 and Complainant may file a reply by no later than Friday, March 13, 2009; and,
- G. That if Complainant received any unemployment benefits in consideration of his termination from Respondent in May, 1999 and is ever required to repay any part or all of those benefits, Respondent will be required to reimburse him for any such payment so that he will be made whole for the full amount of back pay.

HUMAN RIGHTS COMMISSION

ENTERED:

December 23, 2008

BY: _____

DAVID J. BRENT
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION